Supreme Court, U.S.

(1)

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In the Supreme Court of the United States

OCTOBER TERM 1997

Plaisance Dragline & Dredging Co., Inc.,
Petitioner

v.

Jay M. Verdin,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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53 pp

QUESTIONS PRESENTED

This is an action for employment related personal injuries arising from a series of land-based accidents that was brought under the Jones Act, 46 U.S.C. § 688, by a roustabout who had an employment related connection to a spud barge engaged in shore-side construction projects that, the parties agree, totaled 70% of his employment with Plaisance Dragline & Dredging Co., Inc.

1. WAS THE ROUSTABOUT'S EMPLOYMENT RELATED CONNECTION TO THE SPUD BARGE SUFFICIENTLY SUBSTANTIAL IN NATURE SO AS TO ALLOW HIM TO QUALIFY AS A "SEAMAN" AS THAT TERM IS USED IN THE JONES ACT, 46 U.S.C. § 688?

2. DID THE TRIAL COURT PROPERLY INSTRUCT THE JURY ON THE SUBSTANTIAL IN NATURE REQUIREMENT FOR JONES ACT STATUS SO AS TO PERMIT THE JURY TO DISTINGUISH BETWEEN LAND-BASED AND SEA-BASED WORKERS?

3. WAS THE FAILURE TO SUBMIT CERTAIN SPECIAL JURY INTERROGATORIES THAT IDENTIFY THE SPECIFIC BASIS FOR THE PETITIONER'S LIABILITY, IN AND OF ITSELF, SO PREJUDICIAL AS TO CONSTITUTE REVERSIBLE ERROR?

IV. IN A CIVIL ACTION, WHAT IS THE EVIDENTIARY STANDARD THAT A PARTY IS REQUIRED TO MEET IN ORDER FOR THE TRIAL COURT TO CONDUCT A POST-VERDICT INQUIRY INTO WHETHER THE JURY RECEIVED EXTRINSIC INFORMATION?

Rule 29.1 LIST

The only subsidiary of Plaisance Dragline & Dredging Company, Inc. is Lester J. Plaisance, Inc., which is not a wholly owned subsidiary. Plaisance Dragline & Dredging Company, Inc. does not have a parent corporation.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

Plaisance Dragline & Dredging Co., Inc.,
Petitioner

v.

Jay M. Verdin,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Plaisance Dragline & Dredging Company, Inc. respectfully petitions for a Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit did not issue an opinion in this case, but simply affirmed the trial court judgment pursuant to Rule 47.6 of the Local Rules for the United States Court of Appeals for the Fifth Circuit. The court of appeals' *per curiam* affirmance of the trial court's judgment has not yet been published. The rulings of the trial court are also not reported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its judgment on December 10, 1997. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

This case concerns legal issues arising under the Jones Act, 46 U.S.C. § 688(a), Federal Rule of Civil Procedure 49 and Local Rule 13.05 of the Uniform Local Rules for the Easterr District of Louisiana. As a consequence of their length, the text of these provisions are set forth in the Appendix to this Petition. App.D.

STATEMENT

Respondent, Jay M. Verdin, brought suit against his employer, the Petitioner, Plaisance Dragline & Dredging Co., Inc. in the United States District Court for the Eastern District of Louisiana. Asserting that he was a Jones Act seaman, the suit sought damages for personal injuries sustained by the respondent, who claims to have suffered several episodes of low back pain over a two day period while performing land-based assignments at his employer's main yard. Federal jurisdiction was asserted pursuant to 28 U.S.C. § 1331.

The petitioner is engaged in the dragline business, primarily within a thirty mile radius of its principal place of business in Golden Meadow, Louisiana. The respondent was employed as a roustabout, who was usually assigned to

particular draglines in accordance with his employer's job requirements. The particular dragline was usually moved to location through the use of a spud barge, where it would either move on to land or work along the banks of the bayou from the deck of the barge. In addition, the respondent was allowed the opportunity to operate a small "lugger" type vessel, M/V U.S. GRANT, to earn extra income. M/V U.S. GRANT was responsible for providing the motive power for moving the barge to the work location, since the barge itself was not self-propelled.

However, the operation of M/V U.S. GRANT only constituted 14% of the respondent's employment with the petitioner. He spent an equal portion of his employment performing entirely land-based labor, such as cutting grass or constructing parking lots. The remaining 70% of his employment was spent as a roustabout working on land and on the barge with the dragline to which he was assigned. These figures concerning the portion of the roustabout's job assignments are derived from his pay records and are not disputed by the parties.[1] The petitioner has always conceded that the respondent had an employment related connection to the spud barge that furthered its "mission." In addition, the petitioner no longer disputes that the spud barge can be a Jones Act vessel.

What is disputed is whether the assignment as a roustabout was sufficiently substantial in nature so as to qualify the respondent as a Jones Act seaman. Again, the underlying facts are not in dispute. The barge and the

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[1] As both the trial court and the appellate court failed to issue opinions in this case, the petitioner has included the portion of the respondent's closing argument to the jury in the Appendix to establish the percentages of the employees' labor that was asserted to be vessel related for purposes of establishing Jones Act status. App. G.

dragline would initially be moved to the work location by operation of the lugger craft, which movement is included within the previously identified 14% of the roustabout's work that was spent assigned to operate the lugger. Upon arrival at the job site, the lugger craft would shut down and typically remain unmanned for the remainder of the project. All dragline work was then performed either from the barge or on land. Furthermore, the dragline would sometimes be completely moved on to the shore, for periods as long as a month at a time.

It is undisputed that no work could be done on the barge while it was moved across the water. Furthermore, the dragline and work crew could not operate from the barge unless it was firmly secured in place, through the use of its spuds, next to land. Photographs of this general configuration were introduced into evidence by the respondent in support of his claim to seaman status and are included in the Appendix filed with this Petition for the Court's consideration. App. H.

At all times during the course of these projects, after the barge had been moved on to location, the employees remained day laborers who traveled to work by company vehicle and returned home at the end of the work day. There is also no dispute that daily activities frequently took the workers back and forth aboard the barge during the course of a normal work day. Any movement of the barge at the work location consisted of incidental repositioning of the structure either by use of the lugger or by the dragline itself. These repositioning movements occurred infrequently and never exceeded a total of several hundred feet in distance.

The petitioner initially moved for summary judgment on the issue of Jones Act seaman status relying on the case of *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (1st Cir. 1992) *en banc*. The petitioner argued that the roustabout's connection to the spud barge did not qualify him for Jones Act seaman status because these assignments were exclusively to the barge's shoreside enterprises. The Honorable United States District Court Judge Martin L.C. Feldman denied this motion. In his ruling, Judge Feldman observed that *DiGiovanni* was inconsistent with binding precedent from the United States Court of Appeals for the Fifth Circuit, in particular, *Bernard v. Binnings Construction Co.*, 741 F.2d 824 (5th Cir. 1984).

During the pendency of this action in the trial court, this Court issued its decision in *Chandris, Inc., v. Latsis*, 515 U.S. 347, 132 L.Ed.2d 314, 115 S.Ct. 2172 (1995). At trial, the petitioner tendered jury charges in accordance with both the *Latsis* and *DiGiovanni* decisions. In addition, the petitioner submitted certain charges attempting to define the "substantial in nature" requirement set forth in *Latsis* in terms of the sea-going nature of the employee's vessel related connection. App. E. These charges were rejected by the trial court which adhered to the Fifth Circuit's Pattern Jury Instruction on seaman status as first enunciated in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). The trial court did include a jury charge that stated that the employment related connection must be "substantial in nature" in accordance with the language from *Latsis*, but the petitioner objected that this charge, taken as a whole, was inadequate in meaningfully distinguishing between land-based workers and sea-based workers, the latter of whom alone qualify as Jones Act seamen.

In addition, over the objection of the petitioner, the trial court cumulated all of the respondent's alleged injuries over a two day period into a single jury interrogatory for each issue of unseaworthiness, negligence, causation and comparative negligence. App. F. After its deliberations, the jury found seaman status and Jones Act negligence. The jury did not find any unseaworthiness. A very substantial damage award was also returned by the jury.

Within the time delays allowed by law, the petitioner filed post-judgment motions challenging the jury's finding of seaman status. In addition, the petitioner moved for a new trial requesting that the trial court conduct a hearing on possible improper contact with members of the jury by an observer in the court room. The motions were denied and the trial court refused to hold a hearing, ruling instead that the petitioner had failed to bring forward credible evidence that the jury had received extrinsic information. App. B.

A timely appeal to the United States Court of Appeals for the Fifth Circuit was taken from the post-trial motions. The Fifth Circuit affirmed the trial court's ruling *per curiam* without opinion, apparently adhering to its Pattern Jury Instructions on seaman status and vessel status. In affirming, the Fifth Circuit necessarily rejected contrary authority from the United States Courts of Appeals for the First, Sixth and Ninth Circuits on seaman status that were cited by the petitioner. At oral argument, the panel of the Fifth Circuit suggested that this Court's decision in *Southwestern Marine, Inc. v. Gizoni,* 502 U.S. 81, 116 L.Ed. 2d 405, 112 S. Ct. 486 (1991), was controlling and further supported a finding of seaman status since the particular employee in *Gizoni* was not involved in any sea-going activities.

REASONS FOR GRANTING THE PETITION

1. The Decision of the Fifth Circuit is in Conflict with Decisions from the First, Sixth and Ninth Circuit Courts of Appeals on the Issue of Seaman Status under the Jones Act

It is respectfully submitted that in affirming the trial court's rulings, the United States Court of Appeals for the Fifth Circuit failed to properly recognize the importance of the substantial connection inquiry into seaman status, as recently emphasized by this Court in *Harbor Tug & Barge Co. v. Papai*, ____U.S.____, 117 S.Ct. 1535, 137 L.Ed. 2d 800 (1997). Thus, the Fifth Circuit has impermissibly blurred the distinction between land and sea-based workers by allowing land-based workers to acquire seaman status without maintaining a connection to a vessel that is sufficiently substantial in nature. In reaching this result, the Fifth Circuit rejected decisions from other Circuit Courts of Appeals and even district courts in other circuits, which would deny the respondent seaman status as a matter of law.

In particular, both the District Court and the Appellate Court rejected the seaman status inquiry adopted by the United States Court of Appeals for the First Circuit in the case of *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (1st Cir. 1992). *DiGiovanni* has also become the approach followed by the United States Court of Appeals for the Sixth Circuit in resolving whether land-based employees can qualify for Jones Act status by virtue of an employment related connection to a vessel in navigation. *Hatch v. Durocher Dock and Dredge, Inc.*, 33 F.3d 545, 548 (6th Cir. 1994). The trial court in this case expressly refused to follow *DiGiovanni*, instead holding that the Fifth Circuit's 40 year

old test from *Offshore Co. v. Robinson,* remains the proper test for determining seaman status. Thus, there is a direct conflict between the Circuits on which test to apply in determining whether or not a particular land-based maritime employees can qualify as a Jones Act seaman. *See also, Sanford v. Kostmayer Construction Co.,* 891 F.Supp. 1201, 1206 (E.D. La. 1995)(recognizing that *DiGiovanni* not followed in Fifth Circuit), Robertson, *Continuing Issues in the Rights of Injured Maritime Workers in The Wilander-Gizoni Era* 24 Rutgers L. J. 443, 461-62 (1993)(recognizing Circuit conflict).

In addition, by way of post-trial motions and on appeal, the petitioner argued that a United States District Court decision in the case of *Cabral v. Healy Tibbets Co.,* 1995 AMC 2099 (D. Haw. 1995), was further authority for the argument that the respondent lacked seaman status as a matter of law. During the pendency of the appeal of the instant case, the United States Court of Appeals for the Ninth Circuit affirmed the *Cabral* decision. *Cabral v. Healy Tibbits Builders, Inc.,* 118 F.3d 1363 (9th Cir. 1997). In affirming the trial court, the Ninth Circuit was able to interpret this Court's most recent decision, *Harbor Tug & Barge Co. v. Papai,* and apply it to a factually similar case in order to deny seaman status as a matter of law. *Cabral v. Healy Tibbits Builders, Inc.,* 118 F.3d at 1366. Both decisions in *Papai* and *Cabral* were brought to the attention of the Fifth Circuit by correspondence submitted pursuant to Federal Rule of Appellate Procedure 28(j).

In light of the Fifth Circuit's failure to address these conflicting decisions, it, like the trial court, is content to continue to apply the *Robison-Bernard* test to determine seaman

status for Jones Act employees. *See also, Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 569-70 (5th Cir. 1995) (post-*Latsis* case applying *Robison-Bernard* test). It should be noted that the United States Court of Appeals for the Second Circuit also follows a modified version of this Fifth Circuit test. *Tonneson v. Yonkers Contracting Co., Inc.*, 82 F.3d 30, 34 (2d Cir. 1996). In doing so, the Second Circuit expressly declined to follow *DiGiovanni. Id.*

For purposes of identifying the conflict between the Circuits and how it applies to this case, it must be recognized that all of the decisions that are in conflict concern land-based workers whose job assignments take them aboard structures secured in place or along the shoreline. As with the respondent in this case, the workers never perform any work aboard these structures during the most significant navigational movement of the structure across water. Uniformly, the workers are not even aboard the structure during this movement.

Instead, the workers simply board the structure when it is secured into place and, upon completion of their assigned duties at the end of the work day, they leave the structure. While these assignments may take the workers aboard the structure for an entire work day on a daily basis, their assignments to these structures, rarely, if ever, take them to sea with the structure. The conflict therefore focuses upon whether this employment related connection is adequate for purposes of acquiring seaman status under the Jones Act, particularly in light of this Court's recent decision in *Papai.*

Under the Fifth Circuit's traditional *Robison* test, the shoreside employment related connection alone is sufficient

to acquire seaman status, if it is sufficiently substantial in duration. This is because the Fifth Circuit's test is very broad in scope. For example, in pertinent part, the jury was instructed in this case as follows:

> Plaintiff, must prove that the capacity in which he was employed or the duties that he performed contributed to the function of a vessel or fleet of vessels or to the accomplishment of the vessel's mission or to the operation or maintenance of the vessel during its movement *or while at anchor for the vessel's future trips.*

The petitioner has objected to this standard throughout this case for its failure to adequately distinguish land-based workers from true Jones Act seamen.

Furthermore, as this Court's recent decision in *Papai* makes clear, the emphasized language is absolutely contrary to the substantial connection requirement of seaman status. *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. at 1542, 137 L.Ed. 2d at 812. Simply engrafting a portion of the *Latsis* decision on to this test, as the trial court did in this case, is inadequate in making the necessary distinction required by a proper application of the substantial connection inquiry. Indeed, the Fifth Circuit has yet to address the substantial connection requirement of Jones Act status, although the issue was squarely presented to it by this appeal.

Instead of distinguishing land-based workers from seamen based upon a qualitative analysis of the nature of the employee's connection to a vessel, the Fifth Circuit has instead relied upon a test of whether a particular structure is a Jones Act vessel in order to identify who is a Jones Act seaman. This test, first set forth in the case of *Bernard v.*

Binnings Construction Co., 741 F.2d 824 (5th Cir. 1984) looks to objective features of the structure in order to determine if it is a "vessel". If these objective features support a finding of vessel status, the land-based worker is thereby transformed into a Jones Act seaman.

Thus, in most cases involving land-based employees, seaman status in the Fifth Circuit has frequently turned upon the issue of whether a particular structure qualifies as a Jones Act vessel. This approach has not only been criticized, Robertson, *Continuing Issues* 24 Rutgers Law Journal at 461 ("too elaborate and too ambiguous"), Allbritton, *Seaman Status in Wilander's Wake,* 68 Tul. L, Rev. 373, 392 (1994)("a confusing and tortured exercise in mental gymnastics"-), but has also led to inconsistent results within the Fifth Circuit itself. *Compare Ellender v. Kiva Construction & Engineering, Inc.*, 909 F.2d 803 (5th Cir. 1990) *with Ducote v. V. Keeler & Co.*, 953 F.2d 1000 (5th Cir. 1992) *and Sharp v. Wasau Insurance Co.*, 917 F.2d 885 (5th Cir. 1990). In *DiGiovanni v. Traylor Brothers, Co.*, 959 F.2d 1119 (1st Cir. 1992) the First Circuit rejected this analysis for being too mechanistic and bestowing seaman status upon workers who were only aboard the vessel during non-hazardous, non-voyage intervals. *See generally, DiGiovanni v. Traylor Brothers, Co.*, 959 F.2d at 1121-23.

Thus, the outcome of the respondent's status as a Jones Act seaman would depend upon which test would be used to review his employment related connection to the spud barge in this case. In the First, Sixth and Ninth Circuits, this employment related connection would be inadequate as a matter of law to qualify as a Jones Act seaman. Recent trial court decisions would also deny Jones Act status as a matter

of law for lack of a substantial connection, but these courts are struggling to develop a cohesive test to express the qualitative nature of this component of the Jones Act inquiry. *See Gipson v. Kajima Engineering and Construction, Inc.*, 972 F. Supp. 537, 542 (C.D. Cal. 1997)(construction worker lacked substantial in nature connection to barge); *Snowden v. Woodington Corporation,* 963 F. Supp 526, 529 (E.D. Va. 1997)(construction worker had sporadic connection to spud barge); *O'Hara v. Weeks Marine, Inc.*, 910 F. Supp. 257, 260 (E.D.N.Y 1996)(spud barge was not a vessel in navigation) *Nielson v. Weeks Marine, Inc.*, 910 F. Supp. 84, 86 (E.D.N.Y. 1996)(same); *Taylor v. Cooper River Constructors,* 830 F. Supp 300 (D.S.C. 1993)(applying *DiGiovanni*). Indeed, counsel for the petitioner is also asserting the same arguments against seaman status in a case on appeal from a Louisiana State Court, *LeBouef v. Dupre Brothers Construction Company, Inc.*, No. 96-CA-0074 (La.App. 1st Cir), where the issue frequently arises from the nature of local maritime activities.

Only the Fifth and Second Circuits continue to analyze the issue of seaman status without focusing upon the substantial connection component of the Jones Act inquiry. Indeed, if the substantial connection component is recognized at all in these Circuits, it is only in terms of the worker's temporal connection to the vessel, and not in respect to the qualitative nature of that connection as expressly required by *Latsis*. Allbritton, *Seaman Status* at 388 n. 110. It is therefore respectfully requested that this Court recognize this conflict and resolve it by granting this Petition for a Writ of Certiorari so that a uniform analytical framework can be developed for resolving the substantial connection component of the Jones Act inquiry.

Finally, not only is the Fifth Circuit's approach incorrect and in conflict with other Circuit Courts, but in light of the present development of Jones Act jurisprudence and the undisputed facts concerning the respondent's employment related connection to a vessel, this case presents this Court with its most important opportunity to properly define the substantial connection requirement for Jones Act seaman status. It is unfortunately true that this Court has devoted a considerable portion of its limited resources to the issue recently, but so have many trial courts over the past four decades. Yet, this Court is now on the threshold of emerging from "the labyrinth" of its prior jurisprudence on seaman status. This case will provide the Court with an important opportunity to resolve the central inquiry into seaman status in a significant manner so as to eliminate a large portion of any unnecessary confusion in identifying who is a Jones Act seaman at the start of the work day.

It is the lack of a substantial-in-nature connection of these land-based workers to a vessel that will allow this Court to express more clearly this essential element of Jones Act status in a more effective fashion than this Court has previously been allowed by the issues and facts of its prior decisions. The nature of the respondent's employment related connection to a vessel in this case, which was substantial in duration, will provide an opportunity for this Court to draw the necessary distinction between land-based workers and the members of the crew of a vessel that will provide meaningful guidance in most maritime activities where seaman status should not even be at issue. Therefore this case appears at a particularly auspicious period in the development of a more modern approach to seaman status, and with a relatively clean record, thereby providing this Court with an important opportunity to define the key elements of seaman

status under the Jones Act in terms of the employee's substantial-in-nature connection to the vessel.

II. This Case Presents an Important Question of First Impression Concerning Whether the Failure to Use Special Interrogatories Can Constitute an Abuse of Discretion in Cases Involving Multiple Claims for Liability

At trial, the respondent testified that he felt pain in his back on three separate occasions while at work over a two day period. These episodes of pain occurred while he was removing timbers from a pontoon float, while bending over to tie off a boat, and while dismantling a crane boom. Only the timber and crane boom events were submitted to the jury as theories of liability. Furthermore, only the timber incident was supported by medical testimony as a cause of the respondent's injuries.

Nonetheless, over the objection of the petitioner, the court combined both incidents into a single jury interrogatory for each issue of unseaworthiness, negligence, comparative fault and causation. App. F. The jury found negligence and causation, but did not find either unseaworthiness or contributory negligence. The petitioner asserts that the failure to submit special interrogatories concerning each incident which was the basis for a claim for relief is so prejudicial that it constitutes an abuse of discretion and reversible error in and of itself. The prejudice arises because in post-trial motions and on appeal, the petitioner had challenged the sufficiency of the evidence to support a finding of Jones Act negligence based on either incident.

This is an issue of first impression, but it is of singular importance in allowing for the effectiveness of post-trial and appellate review of a jury verdict when a party challenges the sufficiency of the evidence to support a find of liability. Indeed, where the failure to use special interrogatories frustrates a party's ability to challenge the sufficiency of the evidence supporting a judgment, the trial court has abused its discretion and a new trial is warranted because the party has been denied the essence of a "fair trial", which includes the ability to review the evidentiary basis of a jury's verdict. It is respectfully submitted that the recognition of this standard is sufficiently important to warrant review by this Court on a Petition for Writ of *Certiorari.*

This Cout has not yet had the opportunity to consider the importance of Federal Rule of Civil Procedure 49 in respect to multiple claims asserted against a single defendant. There are also no appellate decisions that address the issue. Yet, the issue is critically important because special interrogatories provide the most valuable technique for determining the jury's resolution of disputed fact issues and how these facts are applied to the law. *See generally, Skidmore v. Baltimore & Ohio Railroad Co.,* 167 F.2d 54, 57-61 (2d Cir. 1948); Brodin, *Accuracy, Efficiency and Accountability in the Litigation Process-The Case for the Fact Verdict* 59 U. Cin. L. Rev. 15, 70-1 (1990).

This is particularly true in cases where multiple claims are asserted against a single defendant. The defendant's right to a fair trial should include the right to effective legal review of the jury's verdict in cases where multiple grounds for

liability are asserted. Therefore, in order to protect this right, this Court should recognize that the failure to submit special interrogatories can constitute an abuse of discretion where a defendant is denied a meaningful opportunity to review the basis for the jury's imposition of liability. Accordingly, the petitioner would request that this Court grant the Petition for a Writ of *Certiorari* and recognize that the failure to submit special interrogatories to the jury can constitute an abuse of discretion.

III. A Writ of *Certiorari* is Necessary in Order To Set Guidelines for Conducting a Post-Trial Inquiry Into Whether a Jury Received Extra-Judicial Information

In this case, the petitioner moved the Court in a post-trial motion for a new trial to conduct an inquiry into the possibility of improper communications between the jury and a third person. After trial, it was determined that the third party was a person who drove a juror back and forth to trial each day during a commute that lasted for over an hour each way. The third party remained in the courtroom throughout the trial, including when the jury was excused for rulings by the court. She also had lunch with the jury on at least one occasion and had conversations with several fact witnesses. During the course of jury deliberations, the observer remained with the respondent and his wife. After trial, the observer and the juror, with whom she was commuting to trial, were seen talking to the plaintiff and his wife.

In accordance with the time limits set by Federal Rule of Civil Procedure 59, the petitioner filed a motion for a new trial that raised these facts by affidavit and requested that

a hearing be held on the issue. The District Court refused to conduct the hearing by ruling that there was no colorable claim that extrinsic information was passed to the jury. By applying this objective standard in conjunction with a local rule that prevents contact with jurors without authority of the Court, the petitioner was denied a hearing on the issue of the possibility of jury misconduct.

There is very little guidance from the Circuit Courts as to the necessary burden of proof required for a post-verdict inquiry into the proprieties of jury deiberations. However, the issue presented in this case is significant. As with many courts, the United States District Court for the Eastern District of Louisiana has a local rule absolutely prohibiting post-verdict contact between the jurors and a party, unless expressly allowed to do so by the trial court upon a showing of good cause. *See* Crump, *Jury Misconduct, Jury Interviews and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?* 66 N.C.L. Rev. 509, 526-27 (1988); Comment, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury at the Expense of the Defendant,* 94 Col. L. Rev. 1950, 1956 n. 41 (1994)(majority rule among District Courts). It has been recognized that the burden of coming forward with any evidence to support a post-trial hearing on jury misconduct is, as a practical matter, insurmountable where a party is not allowed to contact jurors without first making an evidentiary showing. Crump, *Jury Misconduct* at 528, Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond,* 65 St. John's L. Rev. 389, 428 (1991).

There is an inherent flaw to these local rules in that a litigant who is prohibited from contacting a juror is

necessarily precluded from presenting evidence that an unauthorized communication occurred. Indeed, the American Bar Association has rejected such a broad prohibition against attorneys contacting jurors. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-29; DR 7-108(D); ABA Comm. on Professional Ethics and Grievances, Formal Op. 319 (1968). Thus, a party seeking to exercise its right to a fair trial will find itself confronted by a local rule that prevents it from conducting any effective inquiry into the possibility of jury misconduct without first making an evidentiary showing.

The question in this case is therefore necessarily framed by both Federal Rule of Evidence 606(b) and, more importantly, by the local rule which prohibits contact with the jurors consistent with the practice in a majority of the Federal District Courts. The petitioner submits that where such a local rule is in effect, the District Court must take a more reasonable and active role in conducting a post-verdict inquiry into the possibility that the jury considered extrinsic information in the course of its deliberations. It is respectfully submitted that the local rule imposed by the Eastern District of Louisiana requires a lesser showing of proof in order to conduct a post-verdict inquiry so that the rights of civil litigants to a fair jury trial are protected.

Accordingly, upon a proper motion, the trial court should review the evidence brought forward within the context of the limitation imposed upon the party seeking to challenge the verdict in order to determine if a hearing is required. Simply viewing the evidence against an objective standard would preclude any inquiry in all but the most obvious cases of juror misconduct where there is clear and

convincing evidence that can be obtained without contacting any jurors. The litigants to civil actions have Due Process Rights under the Fifth Amendment to the United States Constitution that cannot be frustrated by procedural obstacles buttressed by insurmountable evidentiary standards. The fact that the due process denial has been rendered by the court itself, does not cleanse it from what it is. In addition, the attorneys have ethical obligations to insure that the jury conducted itself in a fair and impartial manner.

Therefore, it is respectfully requested that this Court grant the Petition for a Writ of *Certiorari* so that appropriate standards can be developed for the trial courts to conduct a post-verdict inquiry that adequately protects the rights of civil litigants. Civil litigants are entitled to an impartial jury free from extrinsic influences that may subvert the fact finding process. *Abell v. Potomoc Insurance Co.*, 858 F.2d, 1004, 1145 n.48 (5th Cir. 1988); *Hailey v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535 (4th Cir. 1986). Protection of this right is an integral part of the jury system, worthy, in and of itself, of review by this Court.

Respectfully submitted,

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LEE M. PEACOCKE
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Telephone: (504) 846-4260
Counsel for Petitioner Plaisance Dragline & Dredging Company, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 96-30633

JAY M. VERDIN

Plaintiff-Appellee,

VERSUS

PLAISANCE DRAGLINE & DREDGING COMPANY, INC.

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana
(93-CV-3794)

Before DAVIS, JONES, and DENNIS, Circuit Judges,

PER CURIAM:*[1]

AFFIRMED. See Local Rule 47.6

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[1] Pursuant to 5TH CIR.R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.R. 47.5.4.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAY VERDIN	CIVIL ACTION
VERSUS	NO. 93-3794
PLAISANCE DRAGLINE & DREDGING CO.	SECTION "L"

Before the Court are two motions filed by the defendant: 1) Motion for Judgment as a Matter of Law, on the grounds that plaintiff failed to prove that he was a seaman; and 2) Motion for New Trial and/or Remittitur, on grounds that the jury's award was so excessive that it could have resulted only from passion or prejudice, and that the jury might have received extrinsic information. IT IS ORDERED that both motions are DENIED.

Considering the Motion for Judgment as a Matter of Law, viewing the evidence in the light most favorable to the jury verdict, the Court is unable to conclude that there was "no legally sufficient evidentiary basis for a reasonabale jury to find for" the plaintiff on the seaman status issue. *See,* Fed.R.Civ.P. 50(a); *Conkling v. Turner,* 18 F.3d 1285 (5th Cir. 1994).

Considering the Motion for New Trial and/or Remittitur, the Court is unable to conclude that a reasonable person could not have found plaintiff's damages to be that which the jury awarded. *See Jackson v. Taylor,* 912 F.2d 795, 797

(5th Cir. 1990). Nor is there any credible evidence suggesting that the jury received extrinsic information.

Date of Entry: May 21, 1996 s/ Eldon J. Fellon

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAY VERDIN	CIVIL ACTION
VERSUS	NO. 93-3794
PLAISANCE DRAGLINE & DREDGING COMPANY, INC.	SECTION "L"

J U D G M E N T

This matter came on before the Court for trial by jury on previous days. Now therefore, considering the answers of the jury to the interrogatories propounded, the prior dismissal of the intervention in this matter, and the direction of the Court as to the entry of judgment, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Jay M. Verdin, and against defendant, Plaisance Dragline & Dredging Company, Inc., in the amount of Seven Hundred Forty-One Thousand, Five Hundred and No/100 ($741,500.00) Dollars, plus legal interest from the date of judgment, and costs.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that the intervention of Leonard A. Radlauer, a Professional Law Corporation, is dismissed with prejudice.

New Orleans, Louisiana, this 7th day of March, 1996.

s/ Eldon E. Fallon

UNITED STATES DISTRICT JUDGE

APPENDIX D

46 U.S.C. §688

Recovery for Injury to or Death of Seaman

(a) *Application of railway employee statutes; jurisdiction.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damage at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Federal Rule of Civil Procedure Rule 49
Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical

or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deams most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The Court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers, and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict

or may order a new trial. When the answers are inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Louisiana Rules of Court
Uniform District Court Rules

13.05E Interviewing Jurors.

A. No juror has any obligation to speak to any person about any case and may refuse all interviews or comments;

B. No person may make repeated requests for interviews or questions after a juror has expressed his or her desire not to be interviewed;

C. Under no circumstances except by leave of court granted upon good cause shown shall any attorney, party to an action or other person examine or interview any juror. No juror who may consent to be interviewed shall disclose any information with respect to the following:

1. The specific vote of any juror other than the juror being interviewed;

2. The deliberation of the jury; or

3. For the purposes of obtaining evidence of improprieties in the jury's deliberations.

APPENDIX E

DEFENDANT'S REQUESTED JURY CHARGE NO. 48

The total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon.

Thus, a worker would be a seaman

1. when a substantial part of his duties are performed on vessels, and

2. his work significantly exposes him to dangers arising from the movement of vessels on navigable waters.

Chandris, Inc. v. Latsis, 115 S.Ct. 2172, 2190 (1995).

Wallace v. Oceaneering International, 727 F.2d 427, 432-36 (5th Cir. 1984).

David W. Robertson, *A New Approach to Determining Seaman Status,* 64 Tex.L.Review 79,120

Given_____

Not Given_____

DEFENDANT'S REQUESTED JURY CHARGE NO. 49

A seaman under the Jones Act is supposed to be a sea-based maritime employee.

McDermott International Inc. v. Wilander, 498 U.S. 337, 348 (1991).

Given_____

Not Given_____

DEFENDANT'S REQUESTED JURY CHARGE NO. 51

The Jones Act requires an employment related connection to a vessel in navigation. The Jones Act remedies are limited to the members of the crew of a vessel plying in navigable waters. It an employee's regular duties require him to divide his time between vessel and land, his status as a crew member is determined in the context of his entire employment. A seaman must have a connection to a vessel in navigation that is substantial in terms of both its duration and its nature. The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to the special hazards and disadvantages to which they who go down to sea in ships are subjected. The total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereto. The duration of a worker's activities, taken together, determine whether a maritime employee is a seaman because the

ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land based employee who happens to be working on the vessel at a given time.

Chandris, Inc. v. Latsis, 115 S.Ct. 2172, 2190 (1995)

Given_____

Not Given_____

DEFENDANT'S REQUESTED JURY CHARGE NO. 52

Under the Jones Act and the General Maritime Law, seamen do not include land-based workers. The Jones Act distinguishes between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen. The Jones act was intended to protect sea-based maritime workers, who owe their allegiance to a vessel, and not land-based employees, who do not.

Chandris, Inc. v. Latsis, 115 St.Ct. 2172, 2185 (1995)

Given_____

Not Given_____

DEFENDANT'S REQUESTED JURY CHARGE NO. 53

Seamen incur special hazards on the sea, not at dockside. Jones Act seaman status is not available to workers on vessels only during non-hazardous, non-voyage intervals. A worker becomes a seaman not by reason of the physical characteristics of the structure to which he is attached, but because its navigation exposes him to seaman's hazards. Workers assigned to barges for its operation while tied to the shore are not seamen.

DiGiovanni v. Traylor Brothers, Inc., 957 F.2d 1119, 1121-24 (1st Cir. 1992 ((*en banc*).

Given_____

Not Given_____

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAY VERDIN	CIVIL ACTION
VERSUS	NO. 93-3794
PLAISANCE DRAGLINE & DREDGING CO., INC.	SECTION "L"

JURY INTERROGATORIES

Please answer the following questions:

1. Was the plaintiff a "seaman" during his employment with Plaisance Dragline & Dredging Company, Inc.?

Yes X No _____

If your answer to Question 1 is "Yes," then answer Question 2. If your answer to Question 1 is "No," skip the remaining questions, date and sign this form, and return to the courtroom.

2. Was the defendant negligent under the Jones Act and was such negligence a cause of injury to the plaintiff?

Yes X No _____

Proceed to Question 3.

3. Was the US GRANT and/or S/B REBEL I unseaworthy and was such unseaworthiness a proximate cause of injury to the plaintiff?

Yes _____ No X_____

If your answer to Qestion 3 is "Yes" *or* your answer to Question 2 is "Yes," then answer Question 4. If both your answer to Question 3 *and* your answer to Question 2 is "No," skip Questions 4, 5, and 6 and go on to Question 7.

4. Was the plaintiff negligent and was such negligence a proximate cause of his own injuries?

Yes _____ No X_____

If your answer to Question 4 is "Yes" then answer Question 5. If your answer to Question 4 is "No," then skip Question 5 and go on to Question 6.

5. What percentange of plaintiff's injuries were caused by plaintiff's own negligence?

_____%

Proceed to Question 6.

6. What amount, if any, do you find will fairly and adequately compensate the plaintiff for his injuries? (Do not make any deductions for plaintiff's negligence, if any. The Court will make any calculations necessaary.)

1.	Past medical expenses	$ 13,500.00
2.	Future medical expenses	$ 40,000.00
3.	Past Loss of wages	$ 62,500.00
4.	Future loss of wages	$325,000.00
5.	Past and future pain and suffering and loss of enjoyment of life	$300,000.00

Proceed to Question 7

7. Has the plaintiff reached a point of maximum medical cure?

Yes_____ No X_____

If your answer to Question 7 is "Yes," then answer Question 8. If your answer to Question 7 is "No," skip Question 8 and go to Question 9

8. On what date did the plaintiff reach maximum medical cure?

_____, 199_____

If your answer to both Questions 2 and 3 was " No" OR if you answered Question 6, but did not enter an amount for past medical expenses, then answer Question 9. Other wise, skip Question 9 and go to Question 10.

9. What amount, if any, would fairly and adequately compensate the plaintiff for cure?

$_____

10. What amount, if any, would fairly and adequately compensation the plaintiff for maintenance?

$_____

Please date and sign the verdict form and return to the courtroom.

New Orleans, Louisiana, this 1st day of March, 1996.

/s George A. Blount, Jr.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAY VERDIN	*	Docket No. 93-CV-3794 -L
	*	
VERSUS	*	New Orleans, Louisiana
	*	
PLAISANCE DRAGLINE & DREDGING COMPANY, INC.	*	Friday, March 1, 1996

VOLUME FIVE

TRANSCRIPT OF THE TRIAL BEFORE THE HONORABLE ELDON E. FALLON, UNITED STATES DISTRICT JUDGE PRESIDING AND A JURY

Summation of Joshua A. Tilton; Attorney for Plaintiff; Jay Verdin

Page 4, Line 9 through Page 6, line 23:

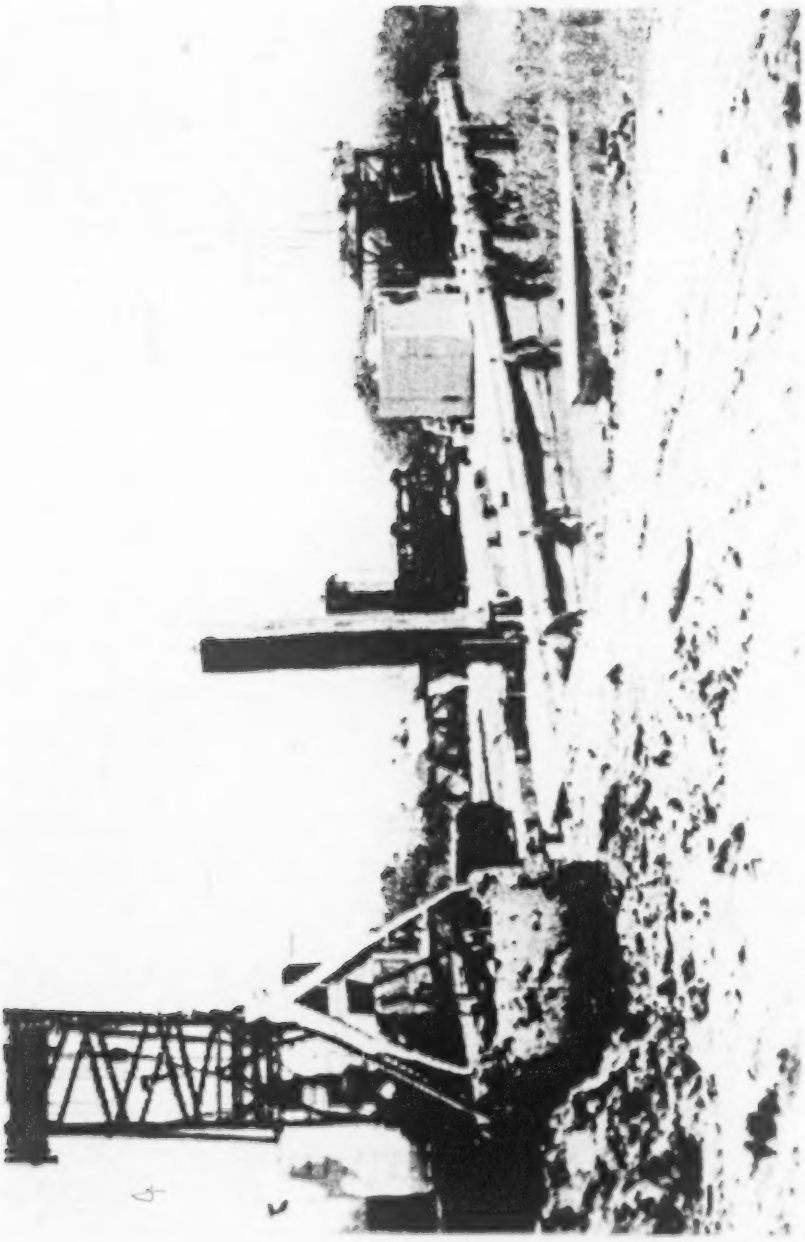
To explore the first question of whether or not, or example, we know US GRANT is a vessel. And the REBEL ONE is a vessel. Because it's documented as one thing by the U. S. Coast Guard. The photographs, you'll see in review, it's got a raked bow. It's got everything it needs to navigate on the water. So there is no question that the US GRANT and the REBEL ONE were vessels.

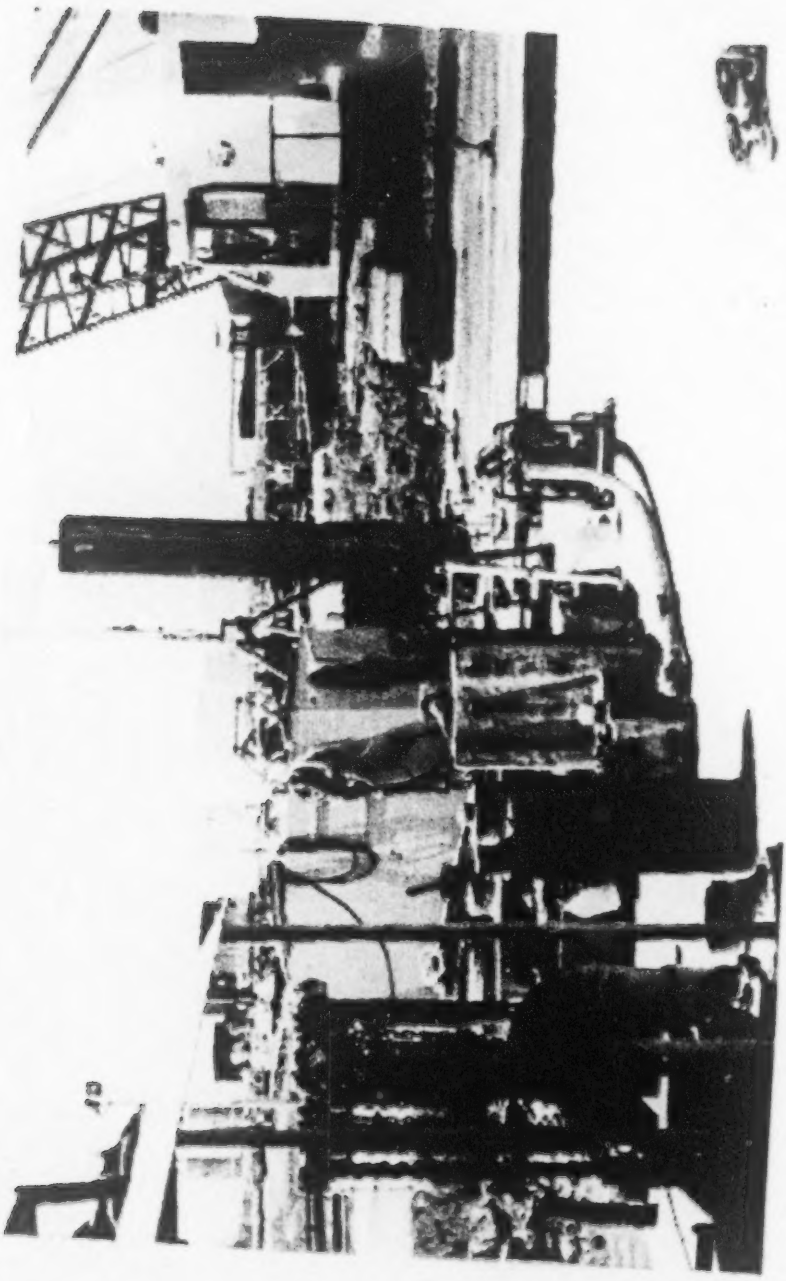
Now you can't look there. They are vessels, they have to do something. So, you have to say, what was the mission, what the purpose, the function of the US GRANT and the REBEL ONE. What did they do. They were designed to carry a 110 ton dragline to job sites all over in the little area we have been talking about, lower Louisiana, to do all kinds of different jobs. So, the defense has said that, well when you get to a job site, the REBEL ONE would spud down and then it would be no longer a vessel. That vessel was still floating at all times. No one ever testified it was taken out of water or anything like that. Occasionally, it was testified the crane would be moved off the REBEL ONE onto the bank to do some work. That did not cease making this stop, this REBEL ONE from being a vessel. It didn't start to become a work platform. What Jay Verdin did was to work in performing duties that directly contributed to the function and the mission of the US GRANT, the REBEL ONE, and the dragline that was part of the equipment that was used to do work. We heard evidence that I think his cousin Nelson Verdin said more work was done from the dragline while it was on the barge REBEL ONE than off. Roy Kiger said that more work was done by the dragline on the barge when it was off, than when it was on. Jay Verdin testified just like them. There was testimony they were the crew. They had been the crew for a year of the US GRANT and the REBEL ONE that carried the dragline. That is a vessel crew doing work all the various facets of the work that are necessary to complete the function of all of the equipment, including the barges, the boat and the dragline. You know, a rose by any other name is still going to be a rose. And if you call Jay Verdin a roustabout or whatever you call him, doesn't make a difference. He would be a seaman under these circumstances, doing the work that contributed to the function of the vessels.

Now you must understand that it's my position that it doesn't make any difference if he had to get off onto the bank occasionally to work, do the work of the vessels. Because he is still contributing to the mission and the function of both the US GRANT and the REBEL ONE because their mission was in conjunction with the dragline, to take it to do work. If he is standing on the bank, it doesn't mean he is then not a seaman. He is still attached and still a member of the crew that is doing the work to complete the task of these vessels were given. And he did it for a long period of time. As a matter of fact that is where the 84.52 percent comes in. Part of the time that was actually driving the US GRANT, 14.2 percent was captain of the USS GRANT, 70 percent was working aboard the REBEL ONE in conjunction with its mission to do the work that the dragline was supposed to do.

Now, the defense is going to say that wasn't my client, is not in the marine business. He is all land. But that begs the question. Because the vessel, the vessels were required to be available to take this dragline to where they were and they were, both vessels were an integral part of what this dragline part of what this dragline did. Further, every one of them testified they tried to put as many tools as they could on the land. When they go on land usually they would be back and forth, a gangplank from the barge to the shore. They could run back and forth to get the air compressor or the cutting tools or whatever they needed to do the job.

APPENDIX H





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